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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 939

S. D. WARREN COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

Opinion Below

The opinion of the Court of Appeals as modified by the order of the Court issued December 17, 1965 (Appendix D, p. 33 below) is printed in Appendix A hereto (pp. 20-30, below). It is not yet officially reported,[1] but is unofficially

[1] An earlier opinion of the Court of Appeals in the matter on a point not in issue in this petition is reported at 342 F.2d. 814.

reported, absent such modification, in BNA Labor Relations Reporter at 60 LRRM 2384 and CCH Labor Cases at 52 L.C. 16,720. The findings of fact, conclusions of law, and order of the Board ((RA-805-17)[2] is reported at 150 N.L.R.B. No. 32. The Board's decision and Direction of Election in the underlying representation proceedings is reported at 144 N.L.R.B. No. 204, and printed herein as Appendix E, (pp. 34-42 below).

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1965 (Appendix A, p. 20 below), on which date it also issued a decree enforcing the Board's order[3] (Appendix B, p. 31 below). Rehearing was denied by order of the Court entered on December 17, 1965 (Appendix D, p. 33 below) in which the Court's judgment of November 8, 1965 was modified by the Court on its own motion. Motion for leave to file motion for reconsideration was filed January 7, 1966 and denied January 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

Questions Presented

1. Whether the National Labor Relations Board may discriminate in matters of unit determination under Section 9 of the National Labor Relations Act solely on the basis of the identity of the industry in which the employer is

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[2] "RA" refers to the Record Appendix printed for the use of the Court below and filed with this petition.

[3] Which has been stayed by order of the Court of Appeals entered December 21, 1965 on condition that this petition be filed with this Court on or before January 25, 1965.

engaged when all other relevant factors are concededly identical?

2. Whether the Court of Appeals was justified in upholding a unit determination by the National Labor Relations Board, predicated on stated reasons as equally applicable to persons excluded therefrom as to those included therein, and hence irrelevant for the purposes of the Board's determination, on the basis that, since the "judicially known" and, presumably controlling, "purpose of Section 9(b) and of the [NATIONAL LABOR RELATIONS] Act as a whole" is "to promote collective bargaining," such determination must be allowed to stand unless it can be said to constitute "a crude gerrymander so delineated that the petitioning unions could win an election in it?"

3. Whether, if the preceding question be answered in the negative, the Court of Appeals was correct in its conclusion that the teaching of this Court's decision in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 383, is that remand to the Board, rather than denial of enforcement, is the right procedure, where as it did not in *Metropolitan*, the Board here has articulated the reasons for its decision in detail, and said reasons are insufficient to support its finding?

Statute Involved

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.)* are set forth in Appendix F, pp. 43-44 below.

Statement

A. *The Board Proceedings*

On November 27, 1962, a petition was filed by four labor organizations as joint petitioners; namely, the Interna-

tional Association of Machinists, AFL-CIO, International Brotherhood of Electrical Workers, AFL-CIO; United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and International Brotherhood of Firemen and Oilers, AFL-CIO (RA-61-4), seeking a voting unit of "All maintenance employees of the Employer's operation [at Cumberland Mills, Westbrook, Maine] including the Dundee Power Stations, the Eel Weir Plant and the Scaropa Plant, Windham and Westbrook, Maine." After exhaustive hearings in which the Petitioner's (hereinafter referred to as the "Company") operations were reviewed in detail, (RA-73-540), the Unions themselves amended their unit request (RA-443-448) so as to limit it to those maintenance employees administratively assigned to the Company's Engineering Division, including any such Engineering Division employees who were permanently assigned to perform their work in other divisions, and also the Machine Shop employees assigned to the Company's Research Division. The parties believed they had stipulated to the inclusion of the latter two groups in any unit which might be found appropriate (RA-295-96, 436). The Unions "left to the Board" the determination of whether *other* full time maintenance personnel (i.e., those administratively assigned to other divisions) should be included, as well as the question of whether Engineering Division personnel performing no skilled maintenance work (such as janitors and cleaners) should be included (RA-575-76). The Company from the outset has maintained that the integrated nature of its operation precludes a separate unit for maintenance employees, but agreed that if any such unit were properly established, it should include all maintenance employees such as the Research Division Machine Shop and the Engineering Department employees assigned to perform their work more or less permanently in other divisions (RA-442).

The Regional Director in his decision (RA-583-587) duly noted the Company's position as to the over-all integration of its operations (RA-577), but proceeded to find as appropriate a unit consisting of certain maintenance employees in the Company's Engineering Division, together with unskilled employees, such as cleaners, janitors, truck drivers, and laborers assigned to that division, but excluding all other maintenance employees, including those administratively assigned to the Engineering Division working in other areas, and the Research Division Machine Shop.

The Board granted the Company's request for review (RA-589-604) and, in a divided opinion, (Chairman McCulloch and Member Fanning for the majority; Member Leedom dissenting) affirmed the Regional Director's ruling in all particulars (RA-604-613; Appendix E, p. 34 below). In his dissent, Member Leedom noted that the unit found appropriate "fails to conform to any kind of unit heretofore found appropriate by the Board, for it is neither craft, departmental, residual, nor historical. It is rather a heterogeneous group of some, but not all of the employees in the Division." (RA-611) and concluded that ". . . the picture is the same irrespective of the camera angle—an arbitrary grouping with no rational foundation." (RA-612)

In the election held on September 12, 1963, pursuant to the Board's order, the Unions received a plurality of 22 votes on the uncontested ballots. There were, however, 41 challenged ballots, including the ballots of 23 excluded Engineering Division maintenance employees assigned to other divisions. In his Supplemental Decision and Certification of Representation (RA-613-630), the Regional Director considered himself bound by the Board's prior decision as to these employees and sustained the challenges to their votes (RA-613-624). Having done so, he found it unnecessary

to resolve the other challenges (RA-622) and issued the certification here in issue.

Following the Board's rejection (RA-664) of the Company's request for review (RA-637-664) and the rejection also of a series of post-election proceedings (RA-664-709) wherein the Company unsuccessfully sought to prevail upon the Regional Director and the Board to reconsider their failure to honor the parties' understandings as to the inclusion of the "permanently assigned" Engineering Division employees and the Research Division Machine Shop employees, a complaint was issued on April 16, 1964 seeking enforcement of the certification in view of the Company's refusal to bargain with the Unions.

In the resulting unfair labor practice proceedings, the Company reasserted its objections to the unit found appropriate, and asserted other defenses not dealt with in this petition. The Board panel reaffirmed (RA-805-817) its prior determination as to the unit issue (Member Leedom again dissenting), rejected the other defenses raised by the Company to its bargaining order, and directed the Company to bargain with the Unions in the unit certified. The case was brought before the Court of Appeals on the Company's petition to review and set aside the Board's order.

The representation proceedings reflected the following facts as to the Company's operations:

Cumberland Mills comprises a series of continuous connected buildings, covering approximately four miles, and located in a 22 acre plot in Westbrook, Maine (RA-712). In addition to the Mill proper, it is served by three hydroelectric plants located from one to twelve miles away (RA-109) and lumbering operations, from which a portion of its raw wood supply is received, located thirty-five to eighty-five miles distant (RA-127).

Within the Cumberland Mills complex, the Company's operations consist of a twenty-four hour per day continuous-flow process of manufacturing paper pulp and finished paper products in which each step is both interrelated with, and dependent on, each other. (RA-606-607)

The Mill is divided administratively into ten divisions; i.e., Woodlands Division (RA-127-132); Pulp Division (RA-147-159); Coating Division (RA-159-171); Finishing Division (RA-171-189); Lithoplate Division (RA-190-198); Roll Storage and Transportation Division (RA-198-204); Administration and Control Division (RA-204-222); Research Division (RA-280-296), and Engineering Division (RA-297-393).

Employees of all Divisions share uniform fringe benefits, common payroll, plant-wide seniority, grievance procedure, participate equally in uniform wage adjustments, and use employee facilities such as cafeterias, rest rooms, and parking facilities, without reference to divisional assignment (RA-227-231), and all are subject to centralized administration as to labor policy (RA-115).

Due to the Company's twenty-four hour operation, there are four different types of work shifts with several departmental variations (RA-126, 607). Each Division includes employees on day shifts (RA-128, 133, 137, 140, 150, 151, 163, 166, 180, 184-85, 192, 199, 272) as well as on so-called "tour," or rotating shifts.

The Company maintains an incentive bonus system applicable to persons whose output can be measured directly (RA-126). All divisions have employees not covered by the bonus system (RA-150, 157, 163, 166, 173, 190), including several entire divisions, such as Pulp (RA-139), Woodlands (RA-128), Research (RA-281), Roll Storage and Transportation (RA-199-200), Administration and Control (RA-209), and Engineering (RA-287 *et seq.*). In sum, ap-

proximately one-half of the entire hourly-rated complement is not covered by the bonus system (RA-126-127).

Each Division embraces a broad range of skills ranging from relatively unskilled jobs such as cleaners, laborers, and truck drivers to highly skilled persons requiring many years of training. Thus, there are cleaners in all divisions (RA-584) and laborers and truck drivers in several (RA-354-357), e.g., Engineering (RA-128), Woodlands (RA-136 *et seq.*), Pulp (RA-198 *et seq.*), Roll Storage & Transportation (RA-200). On the other hand, each Division includes skilled jobs requiring some years of training, such as the Digester Cook in the Pulp Division (RA-139); Paper Machine Operators in the Paper Division (RA-151), etc. It is undisputed that maintenance work is performed by employees throughout the various Divisions; in many instances by employees spending full time on such functions. There are, for example, full time oilers in the Pulp Division (RA-133), as well as equipment maintenance men (RA-251); there is a full crew in the Paper Division whose function is the maintenance of the machinery (RA-257); repairmen are found in the Coating (RA-163; 166), Lithoplate (RA-195) and Roll Storage & Transportation (RA-203), and general maintenance men in the Woodlands Division (RA-242). In addition, much of the maintenance work is performed by so-called production workers themselves, including Oiling (RA-186), Belting (RA-348-49), Piping (RA-374) and Painting (RA-346-49). In sum, it is undisputed that approximately 50 percent of total maintenance is performed by employees in production and research departments (RA-608), with the balance being performed by certain of the engineering personnel described below.

The Company's Engineering Division, in which all of the employees included in the unit are to be found, is a catch-all division comprising a variety of diverse and unrelated functions (RA-302, 303, 611). Like the other Divisions, it

embraces a wide range of skills. The Company maintains no apprentice system for engineering employees. On the contrary, they, in common with employees of all other divisions, are advanced from lower to higher skills by on-the-job training, emphasizing familiarity with the Company's equipment rather than craft skills (RA-385-86). Approximately 50% of the included employees have transferred to their present jobs from jobs in other Divisions (RA-224-225).

Approximately one-third of the efforts of the Division are devoted to maintenance tasks (RA-606-7), the remainder being devoted to new construction and "utilities and related operations" (RA-607). Many of the Division employees included in the voting unit perform no maintenance work at all (RA-326, 331, 365, 368, 511), and some are engaged indirectly in production processes (i.e., the Chemical Recovery Group (RA-275-76, 320-21, 611).

The work areas in which the included employees perform their daily work are scattered throughout the Mill (Employer's Exhibit 4, RA-712), and much of their maintenance work is performed jointly with excluded employees (RA-348-49, 346, 257, 351, 364) as is their work on new construction (RA-579). There are some twenty-three employees administratively assigned to the Division whose work, skills, and other interests are indistinguishable from others in their classification who are more or less permanently assigned to other Divisions, who are excluded from the unit, (RA-507-8) and who work in daily contact with employees of such Divisions.

It is undisputed that the functions performed by the included employees are indispensable to the continuity of the Company's integrated operations previously referred to. In fact, in some situations a malfunction by one man could shut down the entire Mill (RA-344).

B. *The Court Proceedings.*

The Court of Appeals rejected the Company's contentions that a uniform application of Board decisions entitled it to a holding that only a plant-wide unit was appropriate and that the particular unit was lacking in rational support, and enforced the Board's order (Appendix A, pp. 20 to 30 below).

Reasons for Granting the Writ

A. *The Conflict between the Circuits*

The decision of the Court of Appeals below is in direct conflict, both in reasoning and result, with the decision in the Court of Appeals for the Fourth Circuit in *Royal McBee Corp.* v. *N.L.R.B.*, 302 F. 2d. 330 (Fourth Circuit, 1962) printed herein as Appendix G, pp. 45-49 below, on an issue of utmost importance with respect to the administration of the Act in matters of unit determination in integrated industries.

The Board, since shortly after the Taft-Hartley amendments to the Act, has consistently ruled that the establishment of bargaining units less than plant-wide in scope is precluded in four so-called "favored" industries; namely, Basic Steel, (*National Tube,* 76 N.L.R.B. 1199); Wet-Milling, (*Corn Products Refining Company,* 87 N.L.R.B. 187); Lumber, (*Weyerhaeuser Timber Co.,* 87 N.L.R.B. 1076); and Aluminum, (*Permanente Metals Co.,* 89 N.L.R.B. 804), on the reasoning that such industries are highly integrated with basic operations mutually interdependent. In 1954, in *American Potash and Chemical Corp.,* 107 N.L.R.B. 1418, the Board adopted the policy of denying equal application of this rule to other similarly situated continuous-flow, inte-

grated industries while continuing to apply it in the four so-called "favored" industries.

In the proceedings below, the Company asserted that the denial to the Company of equal treatment constituted a violation of the requirement of Section 9(c) (2) of the Act that the Board, in representation matters shall apply "the same regulations and rules of decision . . . irrespective of the identity of the persons filing the petition or the kind of relief sought." Appendix F, page 44 below), and an arbitrary classification in representation matters, based on the identity of the industry in which the employer is engaged, of the sort repeatedly struck down by this Court in such matters, as *Office Employees International Union* v. *N.L.R.B.,* 1957, 353 U.S. 313; *Hotel Employees Local No. 225 et al.* v. *Leedom,* 1959, 358 U.S. 99. In addition, the Company argued that the particular discrimination here involved (i.e., the refusal to accord to its equally integrated operations the same treatment as that accorded those in the "favored" industries) has been ruled arbitrary and beyond the powers of the Board in the decisions of the Court of Appeals of the Fourth Circuit; in *N.L.R.B.* v. *Pittsburgh Plate Glass,* 270 F. 2d. 167 (4th Cir., 1959) cert. denied, and *Royal McBee Corp.* v. *N.L.R.B.,* 302 F. 2d. 330 (4th Cir., 1962).

The Court of Appeals below in no way challenged the accuracy of the Company's assertion that "its Cumberland Mill is just as highly integrated, with its basic operations mutually interdependent, as are the four '*favorite*' [sic] industries." (Appendix A, p. 29 below). Neither did it challenge the validity of the premise that whether viewed as an application of the express statutory command embraced in Section 9(c) (2) of the Act above referred to, or as application of fundamental strictures of administrative regularity, the Board cannot justify discrimination based on industry classification in unit determinations ab-

sent a showing of a relevant basis therefor. Rather, the Court of Appeals here acknowledged the "logic" of the decision of the Court of Appeals in *Pittsburgh Plate Glass*, supra, where, in addition to compelling evidence of over-all integration of operations in the particular plant in issue, evidence was also presented that operations were substantially uniform throughout the industry in question and that a bargaining pattern of over-all plant-wide units had developed in that industry. However, the Court concluded that the "logic" of precluding discriminatory treatment in such a situation did not legitimately extend to a situation of an employer in an industry in which the degree of integration varied from employer to employer with the Company's operations concededly being unique in this regard,[4] and in which an industry-wide pattern of bargaining units does not prevail. In this regard, the Court took issue with the decision of the Court of Appeals of the Fourth Circuit in *Royal McBee Corp., supra,* where such an industry pattern of uniformity of operations and bargaining history was similarly lacking, with the comment:

> "To the extent that the later Fourth Circuit decision in *Royal McBee Corp.* v. *N.L.R.B.*, 302 F. 2d. 330, is to the contrary, we think the Court went beyond the logic of its *Pittsburgh Plate* decision."

Thus, the conflict between the Circuits is apparent on the face of the decision below. Its importance is similarly apparent. The importance of the Board's unit determinations as the initial step in the administration of the Act

[4] The Board's brief below so recognized, on pp. 17-18, stating "And, while it is true that Cumberland Mill is set up in a way similar to the plant in *Corn Products*, *supra*, the *National Tube Doctrine* is an over-all policy decision covering an entire industry, and petitioner has offered no evidence to show that its Mill is typical; indeed, it has insisted that the degree of integration here is unique."

is reflected in this Court's granting of *certiorari* in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 1965, 380 U.S. 348. The importance of the particular issue herein presented is manifest not only by this Court's granting of *certiorari* in other cases involving discrimination based on the industry identification of the employer involved in *Hotel Employees, supra,* and *Office Employees, supra,* but in the fact that the validity of the Board's "favored" industries rule of granting plant-wide units in some industries while denying it in others has been a persistent source of litigation before the Board and the subject of critical comment.[5] The validity of the Board's current policies in this area has a direct and immediate effect on the manner in which the employees in every major industry of a highly integrated nature may be permitted or compelled to exercise, or refrain from exercising, their rights to engage in collective bargaining and other concerted activities under the Act. It is an area in which, Petitioner respectfully submits, a direct conflict such as that reflected here should not be permitted to stand.

While not perhaps strictly germane to the question of allowance of this petition, petitioner respectfully submits that the decision of the Court of Appeals herein is clearly erroneous and that of the Court of Appeals for the Fourth Circuit clearly correct. It is apparent that when it be shown that an employer in a given industry has established operations equally integrated and interdependent as those in other "favored" industries, the fact that other employers in his industry have not done so, is totally irrelevant to the matter of unit determination. Similarly, it is clear that the only basis on which bargaining history is a relevant factor in unit determination is when it can be said to show

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[5] Note: *The National Labor Relations Board's "Integrated Industries" policy: An Administrative Grandfather Clause*, 40 *Washington Law Review* 324 (1965).

the "... parties collective experience and first hand knowledge of the particular operation involved ..." which reflects the "... mutuality of interest as it exists" *Koester Bakery Co.*, 136 N.L.R.B. 1006, 1010, 1012. The Board has long recognized, however, that even where bargaining history is otherwise pertinent, it loses any relevant force where it is demonstrated that the facts on which a particular history is predicated do not obtain in the matter under immediate consideration. This is true not only where, as here, the operations of other employers in the particular industry was shown to differ from that of the employer directly involved (*Halle Bros. Co.*, 87 N.L.R.B., 369, 370; *Baugh & Sons Co.*, 82 N.L.R.B. 1399, 1402) but, indeed, even where the particular bargaining history is that resulting from a prior Board certification involving the very employees of the particular employer, where it is shown that the passage of time has produced material changes in the facts on which the prior unit determination is predicated. (*Humble Oil & Refining Co.*, 155 N.L.R.B. No. 99, 60 LRRM 1450, 1451; *Pacific Intermountain Express Co.*, 145 NLRB. 805, 808-809; *Chrysler Corp.*, 140 N.L.R.B. 1024). Additionally, this factor, i.e., the presence or lack of a uniform pattern of bargaining in the particular industry involved, is one which the Board, itself, has repeatedly declared irrelevant to its "favored" industries unit placement policies. (*The American Brass Co.*, 120 N.L.R.B. 1276, 1277; *Pittsburgh Plate Glass Co.*, 117 N.L.R.B. 1728, 1730, enforcement denied 270 F. 2d. 167 (4th Cir. 1959) cert. denied 361 U.S. 943 (1960); *E. I. DuPont (Houston Plant)*, 126 N.L.R.B. 885, 886 fn. 3; *Southwestern Portland Cement Co.*, 110 N.L.R.B. 1388, 1389-1390; *Beaunit Mills, Inc.*, 109 N.L.R.B. 651, 652-653; *Ketchikan Pulp Co.*, 115 N.L.R.B. 279, 281).

Accordingly, the distinction on which the Court of Appeals below takes issue with the Court of Appeals of the

Fourth Circuit in *Royal McBee Corp.* is one which the Board, as a matter of agency policy, considers immaterial on the issue in question, and which, as a matter of sound logic, is lacking in relevance, granting the concededly unique degree of integration reflected by the Company's operations here in issue.

B. *The Conflict with the Decisions of this Court.*

1. *As to the Particular Unit Determination.*

The decision of the Court of Appeals below is also in conflict with the decision of this Court in *N.L.R.B.* v. *Metropolitan Life Insurance Company,* 1965, 380 U.S. 383, in upholding the particular unit found appropriate here, even assuming that a unit less than plant-wide in scope could otherwise be found appropriate. In *Metropolitan,* this Court made plain that it is the duty of the Board in matters of unit determination to give clear evidence that it has in fact exercised its statutory discretion, citing with approval its earlier decision in *Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 167-9, where this court admonished administrative agencies of the necessity to articulate a "rational connection between the facts found and the choice made" relevant to the statutory purpose which they are charged with enforcing.

The statutory purpose in representation matters under Section 9 of the Act has, since the 1947 amendments,[6] been that of balancing the tension which exists between the two rights of employees protected by Section 7, i.e., "their right to form, join or assist labor organizations, and their

[6] i.e., substituting for the "right to self-organization and to collective bargaining" as the objective of unit determination the present language of "freedom in exercising the rights guaranteed by this Act," including, obviously, the Section 7 right to refrain."

right to refrain from doing so. . .'' (*N.L.R.B.* v. *Teamsters Local 639,* 1960 362 U.S. 274, at page 280, which purpose has replaced that of the much easier-applied affirmative promotion of collective bargaining on which the Wagner Act was predicated. Without attempting to define the precise limitations of relevance in matters of unit determination, it would seem apparent that, as a minimum, the factor or factors relied upon by the Board must be sufficient to identify the persons in the unit found appropriate and differentiate them from the persons excluded therefrom on some basis reasonably relevant to protecting the employees' full freedom of choice, and rendering effective collective bargaining feasible *if* it be desired by the employees.

The Court of Appeals below accepts neither of these fundamental premises. It concededly proceeds on the assumption the controlling purpose of the Act is that ''to promote collective bargaining,'' without any consideration of the equally important statutory purpose of protecting the rights of those who wish ''to refrain.'' From this erroneous basis, it then proceeds to conclude that a unit determination by the Board will stand unless it can be shown to constitute a ''crude gerrymander.''[7] and apparently only in that event.

The decision of the Court below upholds as appropriate a unit predicated by the Board on recited reasons, each of which is as equally applicable to persons excluded from the unit as to those included therein, and thus, logically

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[7] The precise limitation of the Board's unit determination powers intended by this phrase are far from clear. Literally, it would appear to require, not only a division of an employer's operations "in an unnatural and unfair way, esp. to give a . . . party an advantage over its opponent. . ." (*Webster's New Collegiate Dictionary*, 1959 Ed., G. & C. Merriam Co.), but one "unglossed by alleviating disguise" (id). It is difficult to imagine either a Board unit decision which could not meet this test or a concept more clearly in conflict with the standards applied in *Metropolitan.*

irrelevant to the proper determination of an appropriate unit. This is demonstrated by the foregoing statement of facts (above, pp. 3-9) Member Leedom's penetrating dissent (Appendix E, below pp. 40-42) and most particularly by the exclusion from the voting group of Engineering Department employees on the sole basis of the coincidence of work location assignments in the Mill at the time of the hearings. (above pp. 4-6, 9).

In short, petitioner respectfully submits that the decision of the Court of Appeals completely misconstrues the teaching of this Court's decision in *Metropolitan, supra,* and conflicts therewith, both in reasoning and result, and that, the importance of such teaching as to the administration of the Act being manifest, this petition should be allowed for that reason.

2. *As to the Appropriate Remedy.*

The Court of Appeals below, after an extensive discussion of this Court's decision in *Metropolitan* summarizes its interpretation of the teachings of that decision as to procedure, by stating, ". . . that when the propriety of a unit determination is not made apparent by the Board's decision, remand for further proceedings by the Board, rather than denial of enforcement, is the right procedure." (Appendix A, p. 28 below) Thus, the Court apparently reads *Metropolitan* as compelling remand to the Board in all cases where the Board's unit determination cannot be upheld.

It is respectfully submitted that this is in error and in conflict with this Court's decision in *Metropolitan.* This Court made plain that there the Board had not articulated any reason for its conclusion, with the result that neither the Court of Appeals nor this Court could properly review the decision and remanded the matter to the Board for

further proceedings for this reason. This result was obviously the proper one where the Court was unable to determine whether or not the Board's decision was predicated on a rational basis. Obviously, too, it would be a proper decision as a matter of sound judicial discretion in any case where it appeared to the reviewing Court that the Board, with the benefit of the Court's decision on review, might arrive at a different, and validly supportable, conclusion. *Metropolitan* was not, however, petitioner submits, intended to require remand to the Board in situations where the Board has articulated the reasons for its decision and where the Court has found such reasons insufficient to support the result. This is not only demonstrated by the action of this Court in its decision in *American Shipbuilding Co.* v. *N.L.R.B.*, 1965, 380 U.S. 300, and *N.L.R.B.* v. *Brown*, 1965, 380 U.S. 278, but also by the express language of Section 9(d) of the Act (Appendix F, page 44 below), which expressly recognizes the power of the Circuit Court in Review of representation matters, obviously including unit determination, to set aside an order of the Board in whole, or in part, as well as to enforce or modify it, when such order is brought before the Court for review in connection with Unfair Labor Practice proceedings predicated thereon under Section 10 of the Act.

It is submitted that the Court of Appeals below has misread the teachings of this Court's decision in *Metropolitan* as requiring mandatory remand to the Board in all cases where its unit determination is found unenforceable even where the reasons therefor are, as here, clearly articulated. Such reasoning conflicts with this Court's decision in *Metropolitan*, and such conflict, if permitted to stand, could seriously undermine the administration of the Act in that the resulting lack of finality in such matters would impose untold delays in the administration of justice and burdens on the parties and the courts.

The error as to this question will become material in the event petitioner prevails on either of the other questions presented and accordingly constitutes an additional reason why the petition should be allowed.

Conclusion

For the foregoing reasons, this writ of *certiorari* should be granted.

Respectfully submitted,

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Of Counsel
JOHN J. DELANEY, JR.
MURRAY S. FREEMAN

Executed at Boston, Massachusetts
January 21, 1966

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 6452.

S. D. WARREN CO.,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*, MADDEN, *Judge of the Court of Claims*,* and JULIAN, *District Judge*.

John J. Delaney, Jr., with whom *Murray S. Freeman*, *Gordon P. Ramsey*, and *Nutter, McClennen & Fish* were on brief, for petitioner.

Leonard M. Wagman, *Attorney*, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Warren M. Davison* and *Laurence S. Gold*, Attorneys, were on brief, for respondent.

OPINION OF THE COURT

November 8, 1965.

MADDEN, *Judge*. The petitioner, S. D. Warren Co., has filed this petition asking this court to review and set aside an order which the National Labor Relations Board has issued against it. The Board has filed a cross-petition asking the court to enforce, by its decree, the Board's order against the petitioner. The Board's jurisdiction to entertain the proceeding which resulted in its order and this court's jurisdiction in the instant proceeding are not in question.

*Sitting by designation.

A brief recital of the relevant events preceding the Board's order seems necessary. On November 27, 1962, four craft unions, each a member of the AFL-CIO federation, filed with the Board a representation petition asking to be certified by the Board as the joint collective bargaining representative of a unit of maintenance employees at the employer's Cumberland Mill in Westbrook, Maine. The Board proceeded to process the petition and held hearings on it in December, 1962, and January, 1963, at which hearings the unions and the petitioner were represented. In the course of the hearings the unions amended their petition somewhat in regard to the scope of the unit which they sought to represent. The employer took the position that the unit which the unions sought, in their petition as amended, to represent, was not an appropriate unit.

The Board's Regional Director, who, under the Board's rules, had the authority to define the unit in a representation proceeding, specifically and in detail defined a unit and directed an election in which the employees in that unit should vote for or against representation by the petitioning unions. Our petitioner filed a request that the Board review the Regional Director's decision. The Board granted the request, reviewed the proceeding, and, by a divided vote of the three-member panel of the Board, affirmed the Regional Director's decision. The Board's full discussion of the problem, and its decision and direction of an election, are in 144 N.L.R.B. 204.

The election was held. The union won the election by a small majority. The petitioner filed a request for review, and initiated various post-election proceedings requesting the Regional Director and the Board to change their rulings. These efforts of the petitioner were unsuccessful and the unions were certified by the Board as the joint exclusive

bargaining representative of the employees in the defined unit. 150 N.L.R.B. No. 32.

The unions, at last armed with the official certification as the collective bargaining representative, sought to bargain. The petitioner refused to bargain with them. The unions then filed with the Board a charge that the petitioner was violating section 8(a) (5) and (1) of the National Labor Relations Act. A complaint was issued by the Board against the petitioner and a hearing was held before a Trial Examiner of the Board. The parties waived the usual procedure of a Trial Examiner's decision and submitted the case to the Board upon a stipulated record, the Board to make findings of fact, conclusions of law, and an appropriate order.

The Board reaffirmed the conclusions which it had reached in the representation case, discussed above, about the appropriateness of the unit, and affirmed the Trial Examiner's rejection, in the unfair labor practice 8(a) (5) and (1) trial, of evidence which the petitioner had presented in the various stages of the representation proceeding, and of some evidence which was available to the employer at these earlier stages, though it had not been presented. The Board found that the petitioner had violated §§ 8(a) (5) and 8(a) (1) of the Act, and ordered it to cease and desist from these unfair labor practices, to bargain with the unions, and to post the usual appropriate notices. It is this final action of the Board that the petitioner seeks to have us enforce.

The National Labor Relations Act does not provide for direct court review of the actions of the Board in determining the appropriate bargaining unit and certifying the exclusive bargaining agent. But that does not leave the Board's action in these regards final and unreviewable, at least as concerns the employer. It may, as the instant employer has done, refuse to bargain with the representative

certified by the Board and, if the Board in an unfair labor practice proceeding orders it to bargain, it may have court review of the validity of the Board's order, including its certification of the collective bargaining representative. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 154. The petitioner was, then, entitled to have the Board, in the §8(a) (5) and (1) complaint case, take into account, except as indicated in the following sentence, evidence tending to show inappropriateness of the bargaining unit, improper conduct of the election, or any other matter relating to the validity of the certification. But when, as in this case, there has been repeated and persistent litigation by the employer, in the certification proceeding, of numerous grounds of objection, it would be impermissible for an employer to withhold in the representation proceeding an important objection and present it for the first time in the §8(a) (5) and (1) proceeding, to undo what had been tediously worked out in the representation proceeding. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, *supra*, at page 162. The foregoing discussion is not to be taken as suggesting that any evidence was offered in the §8(a) (5) and (1) hearing which was of significance and which had not been presented in the representation proceedings.

As to the evidence which had been presented in the representation hearing, it would have been improper to have it repeated in the unfair labor practice hearing. By the easiest application of the doctrine of judicial notice, that evidence was in the case. It was available as a basis for the petitioner to argue, as it did, that the Board's appropriate unit decision was wrong.

For the reasons stated above, we hold that the petitioner's assertion that the Board erroneously excluded seasonably offered material evidence is without merit.

The petitioner urges that the unions' pre-election representations require that the Board's order be set aside.

About May 25, 1962, some sixteen months before the election was held, the unions distributed a leaflet to employees in the company's Engineering Division soliciting them to sign authorization cards, this being a necessary or useful step toward inducing the Board to hold an election. The leaflet said, *inter alia,*

> Many employees . . . have requested to be represented by their own craft Union, such as; carpenters by the Carpenter's Union, Machinists by the Machinists's Union, Electrician by the Electrical Union, Firemen by the Firemen's and Oiler's Union, etc.
>
> * * * * * * *
>
> Although the enclosed card is in the name of the Machinists Union, it will get you an election and after the election each group will have the opportunity to go in his own Union. . . .

The four named craft unions were the four which in November, 1962, filed the joint petition to the Board asking for a joint certification. An intelligent reading of the leaflet would have informed the reader that he could support the agitation for an election without retiring from or refraining from joining his own craft union. When the election notices were issued and posted by the Board, more than a year later, they made it plain that the representation, if the vote was in favor of it, would be a joint representation by the four unions. The employees could not have been misled. The petitioner's contention is not valid.

The petitioner contends that the Board's order should be set aside because it is based upon an arbitrary and capricious unit determination.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), says:

> The Board shall decide in each case whether, in order to secure to employees the fullest freedom in exercising the rights guaranteed by this act, the union appropriate for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The discretion lodged in the Board is a broad one. In view of the language of §9(b) and of the act as a whole, and of the judicially known purpose of the act to promote collective bargaining, the act is not a mandate to the Board to use its discretion to so define units that unions cannot win elections in the units as defined. The Board's discretion is not, however, unlimited and unreviewable by the courts. If, then, the petitioner's contention in this case that the Board's unit determination was arbitrary and capricious is true, its order should not be allowed to stand.

Of the many tasks entrusted by the Labor Relations Act to the Board, the determination of the appropriate units may be the most difficult. The Board's answer to the unit question is often decisive as to whether or not there is to be collective bargaining, just as the definition of the boundaries of a political election district may determine which party will win such an election. In the early years of the Board, its task of determining the appropriate unit involved it deeply in the then bitter conflict between the craft-unions of the AFL and the industrial unions of the CIO.[1] Obviously, unit controversies do not present situations in which a reviewing court should light-heartedly and captiously second-guess the agency to which Congress entrusted the primary responsibility.

In the instant case the Board had no petition indicating

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[1] See, e.g., *In the Matter of American Can Co.*, 13 N.L.R.B. 1252 (1939), in which the writer of this opinion, then a member of the Labor Board, dissented from the decision of his colleagues.

a desire for collective bargaining in the "employer unit" which would have comprised not only the employer's Cumberland Mill, but also its several other mills located elsewhere. Nor did the Board have a petition indicating a desire for collective bargaining in the "plant unit," which unit would have included all of the some 2800 employees in the Cumberland Mill itself. What the Board did have before it was a petition representing that the employees in the petitioner's Engineering Division desired an opportunity to vote on the question of whether there should be collective bargaining in that Division. As a unit, that would be a "subdivision thereof" of the plant unit and therefore authorized by the statute. The fact that it was authorized by the statute still left with the Board the responsibility of determining whether it was "appropriate" or not. We suppose that the test should be whether, in the circumstances, the proposed unit is rational or not, or, as stated by the employer in its brief, whether it was merely "arbitrary and capricious." If the sought unit represented a crude gerrymander, so delineated that the petitioning unions could win an election in it, it would be irrational for the purposes of the act. But the petitioner's Engineering Division was no gerrymander. It was already in existence, created by the petitioner itself as one of its ten separately supervised divisions. The Engineering Division's work is approximately one third maintenance work, one third new construction work, and one third utilities and related operations work.

In the proceeding which led to the decision of the Supreme Court of the United States in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, this court denied enforcement of the Board's order requiring the employer to bargain with the certified union. 327 F.2d 906.

Section 9(c) (5) of the National Labor Relations Act, 29 U.S.C. §159(c) (5), says:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

This court concluded that the Board had, in that case, determined appropriate a small unit of insurance agents, which unit could be distinguished from units previously determined in other cases involving the same employer and other insurance company employers only by the fact that the union had not yet organized the employees in a larger unit. This court so concluded because, in its opinion, the record in the case did not indicate any other or better reason, and the Board itself, in its unit decision, did not adequately justify its determination.

The Supreme Court reviewed this court's decision, 380 U.S. 438, and held that this court was in error in concluding that the record showed a violation by the Board of Section 9(c) (5). The Supreme Court recognized that the failure of the Board to articulate its reasons for its unit determination made it impossible for this court to enforce the Board's Section 8(a) (5) collective bargaining order, since enforcement would have required a determination by this court that the Board's unit determination was a rational determination. The Supreme Court said:

> When the Board so exercises the discretion given to it by Congress, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." (Citing cases.)

The Supreme Court vacated the judgment of this court and remanded the case to it with instructions to remand

the case to the Board for further proceedings consistent with the Supreme Court's opinion.

We take it that the Supreme Court's decision in the *Metropolitan Life Insurance Co.* case teaches that the Board's discretion in unit determination is a broad discretion and that a reviewing Court of Appeals would rarely be justified in deciding that the Board's unit determination was wrong; that when the propriety of a unit determination is not made apparent by the Board's decision, remand for further proceedings by the Board, rather than denial of enforcement, is the right procedure.

The lessons of the *Metropolitan Life Insurance Company* case are not applicable to our case. The Board's unit determination was not on its face nor in its circumstances lacking in rationality. The Board, in its published decision in the representation proceeding, 144 N.L.R.B. 204, recited its reasons for its unit determination. Those reasons seem to us to be substantial. We assume, at this point, that a unit of less than the petitioner's entire plant would be rational. We discuss hereinafter the petitioner's argument to the contrary.

The petitioner claims that the Board's decision was arbitrary and capricious in that it gave no weight to the expressed agreement of the parties as to unit placement, and ignored the express desires of the employees. This contention relates to a group of 20 employees in a branch of the Engineering Division who did production work or some production work. The Trial Examiner found, and the Board agreed, that there had been no clear agreement of the parties that these 20 employees should be excluded from the unit. As to the petitioner's having agreed to any such detail about the unit, it has always taken and still takes the position that any unit smaller than all the employees in the plant is arbitrary and capricious. It could not, then, have agreed, other than conditionally, to any

detail about a smaller unit. Further, the statute provides that the Board shall determine the unit and it is not for the parties to determine the unit by agreement.

The petitioner contends that "the Board's unit determination fails to afford to the Company the uniform application of the Board's Rules of Decision required by the Act." Under this heading, the employer urges that in an integrated enterprise such as its Cumberland Mill, the only collective bargaining unit that would not be arbitrary and capricious would be a unit comprising all the employees in the plant. It says that the Board has so held with regard to four "favorite industries," namely, Basic Steel, (*National Tube,* 76 N.L.R.B. 1199); Wet-Milling, (*Corn Products Refining Company,* 87 N.L.R.B. 187); Lumber, (*Weyerhaeuser Timber Co.,* 87 N.L.R.B. 1076); and Aluminum, (*Permanente Metals Co.,* 89 N.L.R.B. 904), on the reasoning that such industries are highly integrated with basic operations mutually interdependent. It says that its Cumberland Mill is just as highly integrated, with its basic operations mutually interdependent, as are the four "favorite" industries, and that therefore it is entitled to the same treatment as those industries.

The doctrine which the Board has applied in what the petitioner calls the four favored industries is based by the Board upon the long history of plant-wide collective bargaining in those industries. In the case of *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 270 F.2d 167, 174 (CA 4), the court required the Board to apply the same doctrine to the plate glass industry which, the court said, was "as much if not more integrated than those in the favored group and has an unbroken history of plant-wide bargaining." In that case, then, the court denied a craft union the right to break in upon such a plant-wide collective bargaining situation even though a majority of those in the craft desired to have their own separate representative.

We think that the decision of the Fourth Circuit in *Pittsburgh Plate* is no indication of what a court should decide in a case such as the instant one in which there is no evidence of a regular collective bargaining practice in the paper industry as a whole, [and in which there is evidence that there has been no collective bargaining at all in the Cumberland Mill here under consideration.]* In such a situation we think it is not the responsibility of the employer or the Board to keep the field open for some hypothetical future plant-wide union by keeping out craft unions or department unions which, if they got in, might at some indefinite time in the future mar the symmetry of plant-wide bargaining. To the extent that the later Fourth Circuit decision in *Royal McBee Corp.* v. *N.L.R.B.*, 302 F. 2d 330, is to the contrary, we think the court went beyond the logic of its *Pittsburgh Plate* decision.

The petition of the S. D. Warren Company to adduce further testimony is denied. Its petition to set aside the order of the Board is denied.

The cross-petition of the National Labor Relations Board for enforcement of its order is granted in full.

[*This portion stricken by order dated Dec. 17, 1965. See p. 33 *infra*]

APPENDIX B

DECREE

November 8, 1965

This cause came on to be heard upon petition to review and set aside, and on cross-petition for enforcement of, an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition to review and set aside is denied; and the order of the National Labor Relations Board of December 16, 1964, is hereby affirmed and enforced in full.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

A true copy:

Attest: (s) ROGER A. STINCHFIELD
Clerk.

[Cert. cc.: The N.L.R.B. and Messrs. Delaney, Mallet-Prevost and Alpert.]

APPENDIX C

ORDER OF COURT

November 8, 1965

It is ordered that the petition to adduce further testimony be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD,

Clerk.

[cc: Messrs. Delaney, Mallet-Prevost and Alpert.]

APPENDIX D

ORDER OF COURT.

December 17, 1965.

It is ordered that the petition for rehearing filed November 18, 1965, be, and the same hereby is, denied; and, by the Court's own motion

It is ordered that the slip opinion of November 8, 1965, be, and the same hereby is, modified as follows: Page 11, line 5, after the word "whole", the comma is changed to a period, and the remainder of the sentence is stricken.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

[cc: N.L.R.B. and Messrs. Mallet-Prevost, Delaney and Alpert.]

APPENDIX E

BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-7215
In the Matter of
S. D. WARREN COMPANY
EMPLOYER
and
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO;
UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO and
INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS, AFL-CIO
JOINT PETITIONERS

Case No. 1-RC-7215

On April 4, 1963, the Regional Director for the First Region issued a Decision and Direction of Election in the above-entitled proceeding. Thereafter, the Employer, in accordance with Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, filed with the Board a timely request for review of such Decision and Direction of Election with a supporting brief on the ground that the unit found appropriate by the Regional Director raised substantial questions of law and policy. The Joint-Petitioners filed a brief in support of the Regional Director's findings. The Board, by telegraphic Order dated May 1, 1963, granted the request for review and stayed the election.

The Board[1] has considered the entire record in the case

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[1] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

with respect to the Regional Director's determination under review together with the briefs of the parties and makes the following findings:

On the basis of the Joint-Petitioners' general request for a unit of maintenance employees, the Regional Director found appropriate a unit limited to the Engineering Division, consisting of all employees in the following departments or sections:[2]

> "Instrumentation and Steam Distribution, Power Boilers and New Boiler House, Bark Burner Boiler, Chemical, Smelting and Recovery Unit, Mechanical Power Maintenance, Steam Engineers, Oilers, Electrical Stations, Paint Shop, Belt Shop, Machine Shop, Electrical Shop, Grinder Room, Rigger Shop, Carpenter Shop, Piping Shop, Mason Shop, Tin Shop, Welding Shop, Laborers and Truckmen; and employees located at the Dundee, Eel Weir and Saccarappa Hydoelectric Stations, Janitorial and Custodial employees of the Engineering Division, and Leadmen in the respective departments and locations listed above; but excluding all other employees; employees of the Engineering Division permanently assigned to other Divisions of the Mill, Research *Division* employees, Dispatcher, Assistant Dispatcher, Telephone Operators, Office Clerical and Plant Clerical employees, Technical employees, Professional employees, Foremen, Guards and Supervisors as defined in the Act."

The Employer contends that the unit found appropriate is heterogeneous in nature and is neither an appropriate maintenance nor a departmental unit. It further contends that the operations of the mill are too integrated to permit

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[2] As amended in ORDER CORRECTING DECISION AND DIRECTION OF ELECTION issued on April 13, 1963. The parties agreed that employees of Project Engineering, Design Engineering, and Construction Engineering Sections, as well as dispatcher, assistant dispatcher, telephone operators, and office clericals, be excluded.

separate bargaining units, and that only an overall production and maintenance unit is appropriate.

The Employer's mill, located at Westbrook, Maine is engaged in the manufacture and sale of fine printing and specialty papers and has had no history of collective bargaining. The mill comprises a series of continuous connected buildings, covering approximately 4 miles and includes three hydroelectric plants which are located from approximately 1 to 12 miles from the mill and supply the power for its manufacturing process. Of the approximately 1,700 hourly rated production and maintentance employees, approximately 400 are in the unit found appropriate by the Regional Director.

The mill's operations, like that of similar paper manufacturing operations, may be described as a "continuous process" of chemical and machine operations, with each manufacturing operation related to the preceding one. The mill is divided administratively into the following described 10 separately supervised divisions. The Woodlands, Pulp Mill, Beater Machine, Coating, Finishing, Lithoplating, Roll Storage and Transportation, and Research Divisions are concerned directly with the production and manufacture of paper. The Administration and Control Division provides office and clerical support. The work of the Engineering Division, as detailed below, is devoted to approximately one-third maintenance, one-third new construction, and one-third utilities and related operations.[3]

[3] The Chemical, Smelting and Recovery unit in the Engineering Division is concerned with the recovery of usable chemicals from spent chemicals in a form suitable for further working and could conceivably be considered part of the productive process. The unit also produces steam for productive departments and has employee classifications similar to the utility operations. Approximately 20 employees are employed in this unit. The record does not indicate the amount of time or the specific employees involved in the two operations. Thus the chemical recovery unit is at most only a minor operation in the overall department.

Most employees in the production departments are classified as machine watchers or tenders and spend a major part of their time in the varied aspects of the paper production process. As an incident of their work, these employees also make minor and routine mechanical repairs. Some employees, classified within their respective departments as paper machine maintenance employees, repairmen, oilers, and mechanics, spend full, or a high percentage, of their time doing repair or preventative maintenance work. This work can be characterized as incidental to the production process. The Research Department as its name implies develops and tests new processes and equipment. Included in this Department are approximately 13 employees who do specialized mechanical and maintenance work on new and experimental equipment when it is first placed in operation in the mill. In their combined efforts the employees in the production and research departments perform approximately 50 percent of the total maintenance work, the balance being performed by employees of the Engineering Division.

The record indicates that the mill operates around-the-clock, with four different types of work shifts and several departmental variations. Most of the employees directly engaged in the paper-making process are on a bonus and incentive system and work on other than daytime shifts. The Employer maintains a mill-wide seniority policy predicated upon skill and ability in addition to length of service. However, since there have been no recent layoffs, the record is speculative as to how "bumping rights" would be exercised among the various departments. All the hourly-rated employees enjoy a similar vacation, holiday, grievance procedure, life insurance and pension plans, and retirement benefits, and use the same locker and canteen facilities. Employees do not punch time clocks, but keep and report their own hours. Although the record shows that there are

transfers among the production departments and the Engineering Division, the record does not reveal the frequency of such transfers or the basis upon which such transfers are made.

The Engineering Division, like each of the other divisions, has its own separate line of supervision, running from top management through the multiple departments included therein. However, it differs in major respects from the other divisions. (1) The Engineering Division is primarily staffed with employees trained to perform the more highly skilled craft and maintenance duties required in maintaining the mill's operations and in the expansion of the mill's facilities. These skilled employees are separately based and work out of various craft shops, such as metal working, carpentry and millwright, rigging, pipefitting, painting, and masonry, which are located in various parts of the mill. The Employer does not have a formal apprenticeship program, but has an on-the-job training program by means of which a "helper" advances through various steps within a given job classification under an established progression schedule. (2) The work of the Division is primarily devoted to maintenance and construction, performing approximately 50 percent of the mill's maintenance and 85 percent of the new construction work. Major maintenance jobs are carried out almost entirely under the Engineering Division's supervision. When a maintenance job is beyond the capability of maintenance employees in the various production departments a request for specialized workmen is made to the Division. When an Engineering Division crew works in a production area, they are under the nominal supervision of the production supervisor in the area of work and may utilize production maintenance personnel to assist, depending upon the nature of the work to be performed. Although the record shows that at lower levels the maintenance skills of many of the

employees in production departments are related, it is clear that the bulk of the highly skilled craftsmen are in the Engineering Division. The specialized equipment in the various craft shops in the Division is not utilized by employees doing maintenance work in other divisions.[4]

Included in the Engineering Division are the utility operations which supply the mill's electricity and steam. In common with other employees in the Division, utility employees do not operate production machines and do not participate in the Employer's incentive bonus plan.

Around the first week in July of each year it is the Employer's practice to close the plant for approximately 1 week, at which time the Engineering Division works throughout the mill rebuilding, replacing, and repairing mill machinery and buildings, and engages in new construction work. In 1962 approximately 100 employees from other divisions worked under the supervision of the Engineering Division in the performance of this work.

In all the circumstances of this case, including the absence of any bargaining history and the fact that the Engineering Division is a distinct administrative subdivision of the Employer, having a functional base of maintenance, construction, and utility work and employing primarily skilled employees who work out of their respective craft shops and do not work directly in the productive process, we agree with the Regional Director's conclusion that such unit limited to the Engineering Division, as described above, is appropriate for collective-bargaining purposes. In reaching this result we are not unmindful of the fact that there is some overlapping of work skills among some of the employees doing maintenance work in the produc-

[4] Seventeen skilled maintenance employees (2 oilers, 5 carpenters, 1 welder, and 9 machinists) are permanently assigned from Engineering to the Paper Mill and Wood Yard Divisions. For all practical purposes, these assigned employees are not part of the Engineering Division and were excluded by the Regional Director in his unit finding.

tion divisions and some of the lesser skilled employees in the Engineering Division. However, we do not believe that in the circumstances of this case that this factor is sufficient to destroy the homogeneity and mutuality of interests of employees in the Engineering Division.[5] Nor do we believe that the record shows such a degree of integration between the Engineering and other divisions as to preclude the establishment of a unit other than one plantwide in scope.

Accordingly, the case is hereby remanded to the Regional Director for the First Region for the purpose of holding an election pursuant to his Decision and Direction of Election, except that the payroll period for determining eligibility shall be that immediately preceding the date below.

Dated, Washington, D.C. Aug 23 1963

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, ... *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LEEDOM, dissenting:

I do not agree with my colleagues that the unit of employees in the Employer's Engineering Division, as described in the majority opinion, is appropriate for collective-bargaining purposes. This unit fails to conform to any kind of unit heretofore found appropriate by the Board, for it is neither craft, departmental, residual, nor historical. It is rather a heterogeneous grouping of some, but not all, the employees in the Division. The sole common denominator of the included employees is the fact that

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[5] The Board has consistently held that a departmental unit need not include employees of similar skills that are outside the department. See *General Dynamics, Telecommunications, a Division of General Dynamics Corp.*, 140 NLRB No. 126; *Kennard Corp.*, 114 NLRB 150; *American Bosch Arma Corp.*, 115 NLRB 226. Nor do we believe that the hydroelectric stations should be excluded on the basis of public interest because they supply heat to a local hospital and church and could conceivably control the generation of power by a local public utility company in view of the record clearly indicating that the stations are under the Employer's control and operation.

they have been assigned administratively to the same division, a catch-all division at best.

The unit description itself, and my colleagues' findings, demonstrate the heterogeneity of this unit. Thus, as my colleagues point out, "The work of the Engineering Division . . . is devoted to approximately one-third maintenance, one-third new construction, and one-third utilities and related operations." One of the "related operations," apparently, is the Chemical, Smelting and Recovery unit which, according to our colleagues, "could conceivably be considered part of the productive process." Thus, there is ample demonstration that the unit lacks functional homogeneity. Nor is there a homogeneity of skills, as the skills of the employees in the unit run the gamut from those of skilled craftsmen to those of unskilled laborers, with all shades and varieties of skills in between. The unit, moreover, does not meet the test of an appropriate multicraft maintenance unit, as it includes many employees who are not engaged in maintenance work, and excludes employees who perform approximately 50 percent of the total mechanical maintenance work in the mill. Likewise, as there is no history of bargaining, the unit cannot be justified on historical grounds; and as there are other unrepresented employees, it is clearly not a residual unit.

Thus there is left to support the unit nothing but the tenuous bond of administrative assignment. Yet even if I assume that administrative assignment without more could be deemed a common bond sufficiently strong to justify a unit finding, the unit here would still be without adequate foundation. For it does not include all who are linked by this same bond; i.e., the 17 skilled maintenance employees attached to the Paper Mill and Wood Yard Divisions, and various clerical and other employees, are excluded. Although these 17 skilled employees may, as my colleagues aver, "for all practical purposes" be function-

ally part of other divisions, they are still administratively part of the Engineering Division and thus partake of the only mutual interest which binds together all the other employees in the unit now found appropriate.[6]

In my opinion, the picture is the same irrespective of the camera angle—an arbitrary grouping with no rational foundation. If the foundation is deemed to be solely administrative organization, the unit excludes employees in the Division who should be included. If the foundation is deemed to be either skills, or functions, or both, without regard to administrative organization, the unit excludes employees outside the Division who have the same skills or functions, and includes employees within the Division with diverse skills and functions. If the foundation is deemed to be skills and/or functions within an administrative unit, there are still employees in this so-called appropriate unit who do not belong because of their diverse skills and functions.

As the unit found appropriate cannot be supported on any rational basis, I dissent from my colleagues' refusal to set aside the Regional Director's unit determination.

Dated, Washington, D.C. Aug 23 1963

BOYD LEEDOM, *Member*
NATIONAL LABOR RELATIONS BOARD

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[6] Similarly, it is clear that the parties have agreed to exclude certain employees administratively part of the Engineering Division, as office clerical, technical, and professional employees, because they regarded these employees as functionally distinct from the other employees sought. But the basis for their agreement is not the basis for my colleagues' unit finding. Hence, it is doubtful that the parties' agreement is entitled to much weight, proceeding as it does on a basis which my colleagues eschew.

APPENDIX F

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

REPRESENTATIVES AND ELECTIONS

* * *

9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises;

but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *

(c)(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

APPENDIX G

ROYAL MCBEE CORPORATION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 8524.
United States Court of Appeals
Fourth Circuit.
Argued March 30, 1962.
Decided May 7, 1962.

Ransom A. Ellis, Jr., Springfield, Mo. (Walker, Daniel, Clampett, Rittershouse & Ellis, Springfield, Mo., and B. H. Clampett, Springfield, Mo. on brief), for petitioner.

Allison W. Brown, Jr., Attorney, National Labor Relations Board (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Asst. General Counsel, and Judith Bleich Kahn, Attorney, National Labor Relations Board, on brief), for respondent.

Before SOBELOFF, *Chief Judge,* and SOPER and HAYNSWORTH, Circuit Judges.

SOPER, Circuit Judge.

This case comes before us on petition to review an order of the National Labor Relations Board which required the Royal McBee Corporation to bargain collectively with Local Union No. 453, International Brotherhood of Electrical Workers, as bargaining agent of a separate unit composed of three electrical maintenance employees at the Springfield plant of the corporation. The union had been previously certified as the bargaining representative of the craft unit but the company had refused to bargain with it on the ground that the Board had improperly determined in the

representation proceedings that the electrical maintenance employees were entitled to separate representation.

The representation proceedings were instituted by the International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, AFL-CIO (UAW), on November 24, 1959, in an effort to secure representation of all of the employees in the Springfield plant. Shortly thereafter the I.B.E.W. petitioned to represent the electrical maintenance workers as a separate unit and the U.A.W. amended its petition to exclude them, and the two proceedings were consolidated. At this time the company was in the midst of transferring its business of manufacturing portable typewriters from its plant at Hartford, Connecticut, to its new plant at Springfield, Missouri, and also in organizing its plant at the latter place. The training operations for the Springfield employees began in February and the new plant was partially occupied for assembly purposes in August 1959. Meanwhile the manufacture of parts continued at Hartford from which point they were sent to Springfield for assembly. When the hearing on the representation proceedings was held the work force consisted of 605 employees out of a total projected work force to be finally employed of 1360 employees. Evidence was introduced at the hearing in proof of these facts. It indicated that when the plant was fully organized the manufacturing operations would constitute a continuous operation in which the raw materials would be put through presses and machines and the manufactured parts routed by electrically driven belts through successive operations until upon final assembly of the parts the completed typewriter would be produced. In short, the manufacturing operation would comprise a single system which integrated all the production processes and, if uninterrupted, would turn out a finished machine, but if interrupted at any point the flow of

parts would be stopped and the entire production line would be affected.

The Hearing Officer, however, reached the conclusion that the maintenance electricians comprised a distinct craft entitled to separate representation, and the Board affirmed his findings and ordered that in conjunction with the election to determine the choice of a representative for the employees generally there be held an election for the maintenance electricians in order to determine whether they wished to be included in the plant-wide unit or in a separate unit represented by the I.B.E.W. At the subsequent election a majority of the production and maintenance employees indicated that their choice was not to be represented by any labor organization while a majority of the three maintenance electricians cast their votes for the I.B.E.W., which thereupon was certified by the Board as their bargaining representative. On June 29, 1960 the I.B.E.W. requested the company to bargain but it refused asserting that the Board's unit determination with respect to the representation of the maintenance electricians was improper.

Thereupon the I.B.E.W. filed a complaint against the company and a hearing was had before an Examiner. At this hearing the company made an extensive offer of proof, in addition to that adduced at the representation hearing, in order to show that in the interval between the two hearings the Springfield plant had become fully organized and that the manufacturing operations of the company were as fully integrated as those performed by steel mills in the production of steel. The Examiner rejected the offer on the ground that the completion of the Springfield plant had been brought to the attention of the Board on a motion of the company to reconsider the unit determination which the Board had overruled; and also because the basic facts in the offer of proof were essentially a restatement in greater detail of those offered and considered in the repre-

sentation case. The Board affirmed the findings of the Examiner and ordered the company to cease and desist from refusing to bargain with the craft unit. Thereafter the company filed a motion to reconsider and set aside the Board's decision and order, wherein it called attention to the fact that the craft unit designated for bargaining purposes by the Board had been reduced in size to a single man in the interval between the issuance of the Examiner's intermediate report and the Board's decision and order, but this motion was denied.

In both the representation proceedings and the unfair labor practice proceedings the company invoked the decision of this court in N. L. R. B. v. Pittsburgh Plate Glass Co., 270 F.2d 167, certiorari denied, 361 U.S. 943, 80 S.Ct. 407, 4 L. Ed.2d 363. In that case we denied enforcement of an order of the Board requiring the employer to bargain with the representative of a craft unit of electricians who constituted a small minority of the employees in the integrated plant of the company in Cumberland, Maryland. The order of the Board, as was shown in our opinion, was in line with the policy it set forth in American Potash and Chemical Co., 107 NLRB 1418, wherein it announced the rule that craft units would be split off from an established industrial unit when requested by a union that traditionally represents employees in the craft, irrespective of the degree of integration in the industry or the custom prevailing therein. Thereby the Board reversed the policy it had previously laid down in National Tube Co., 76 NLRB 1199, affecting the integrated steel industry, and in later cases affecting three other industries, where it was held that a separate unit of employees for bargaining purposes in an integrated plant would be detrimental to the basic wage structure underlying the operations and would have an adverse effect upon the productive capacity of the industry. The Board's policy with respect to the four favored industries, not-

withstanding its decision in American Potash, was continued in effect. In view of this situation we held in Pittsburgh Plate Glass Co., that the action of the Board in denying to the plate glass industry the privilege accorded to other integrated industries was arbitrary and improper and, therefore, should not be enforced.[1]

The Board refused to recognize the authority of this decision in the proceedings in the case at bar. Noting that our opinion had been called to its attention, it said: "With all due respect to the opinion of the Court in that case the Board has determined to adhere to its policy, as expressed in American Potash and Chemical Corporation, 107 NLRB 1418, with respect to the severance of craft units." Accordingly, in both of its decisions the Board confined itself to demonstrating that the maintenance electricians comprise an identifiable group of craftsmen who possess and exercise the skills of their craft, and are, therefore, entitled to a bargaining representative as a separate group. There was, however, no finding in either decision that the company's Springfield plant is not integrated and no discussion of the possible harm to the operation of such a plant in setting up a separate bargaining group for a few employees upon whom the operation of the whole plant depends. Nor was there any attempt on the part of the Board to discuss the charge that, in excepting certain integrated industries from the American Potash rule and at the same time rigidly subjecting other integrated industries to the rule, it exceeds its powers under the statute. Under these circumstances we find no reason for receding from the position we took in the Pittsburgh Plate Glass Co. case. The petition of the company is, therefore, granted and enforcement of the order of the Board is denied.

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[1] The policies which the Board has pursued from time to time with respect to the creation of separate craft units for bargaining purposes were again reviewed in our opinion in N. L. R. B. v. Industrial Rayon Corporation, 4 Cir., 291 F.2d 809.

In the Supreme Court of the United States

October Term, 1955

S. D. WARREN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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208-042—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 939

S. D. WARREN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 353 F. 2d 494 (Pet. 20–30, 33). The Board's decision and order in the unfair labor practice case (R.A. 815–819 [1]) are reported at 150 N.L.R.B. No. 132. The Board's decision and direction of election in the underlying representation case (Pet. 34–42) are reported at 144 N.L.R.B. 204.

JURISDICTION

The decision and decree of the court of appeals were entered on November 8, 1965 (Pet. 20, 31). A

[1] "R.A." references are to the portions of the record printed for the use of the court below and filed with the petition for certiorari.

petition for rehearing was denied on December 17, 1965 (Pet. 33), and a motion for reconsideration was denied on January 14, 1966 (Pet. 2). The petition for a writ of certiorari was filed on January 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act in establishing a bargaining unit confined to the employees of the Engineering Division of the employer's paper mill.

STATUTE INVOLVED

Section 9(b) of the National Labor Relations Act, 49 Stat. 453, 29 U.S.C. 159(b), provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

STATEMENT

At the hearing on a joint representation petition filed by the International Association of Machinists, AFL–CIO, International Brotherhood of Electrical Workers, AFL–CIO, the International Brotherhood of Firemen and Oilers, AFL–CIO (hereinafter "the Unions"), which sought the establishment of a unit of maintenance employees at petitioner's Cumberland

Mill in Westbrook, Maine, the following facts were adduced:

The Cumberland Mill is engaged in the manufacture and sale of fine printing and specialty papers, and has had no history of collective bargaining (Pet. 36; R.A. 111). The mill (which consists of a complex of connected buildings covering approximately 4 miles, and 3 power plants located at distances of between one and 12 miles from the complex) is divided administratively into 10 separately supervised divisions, each consisting of a number of departments (Pet. 36; R.A. 274–280); eight divisions are concerned directly with the production and manufacture of paper (Pet. 36). The mill employs approximately 2,700 employees, of which some 400 are in the Engineering Division (Pet. 36; R.A. 105, 108–110). The work of the Engineering Division is devoted approximately one-third to maintenance, one-third to new construction, and one-third to utilities and related activities (Pet. 36; R.A. 393).

The Engineering Division, like each of the other divisions, has its own separate line of supervision, running from top management through the multiple departments it includes (Pet. 38; R.A. 207–300). It is primarily staffed with employees trained [2] to perform the more highly skilled craft and other duties required to maintain mill operations and to expand its facilities, as well as with employees capable of

[2] The Company does not have a formal apprenticeship program, but does provide on-the-job training under which a helper advances by stages within a given job classification under an established progression schedule (Pet. 37; R.A. 310–312, 351–352, 384–386).

running the mill utilities (Pet. 38; R.A. 297–300, 301–303, 335–336, 360–361, 364, 373, 385–386). The employees in the division are distributed among the various craft shops located throughout the mill, such as metal working, carpentry, and rigging, and in the various powerhouse departments (Pet. 38; R.A. 297–300, 301–303).

Although the production divisions also have employees who perform maintenance work, theirs is largely of a minor or preventive nature (Pet. 37; R.A. 133, 202, 257); major maintenance jobs are carried out almost entirely under the Engineering Division's supervision. Thus, when a maintenance job is beyond the capability of maintenance employees in the various production divisions, a request for specialized workmen is made to the Engineering Division (Pet. 38; R.A. 364–365, 472–473, 179, 202, 238, 347–349). The specialized equipment in the various craft shops in the Engineering Division is not utilized by the employees of other divisions (Pet. 39) and, conversely, none of the Engineering Division employees operates production machines (Pet. 39). The Company closes the mill for about one week every year, at which time the Engineering Division rebuilds, replaces, and repairs mill machinery and buildings, and engages in new construction work (Pet. 39; R.A. 223–224). Also, while the mill operates on a 24-hour basis, in four shifts (Pet. 37; R.A. 114, 125–126), 70 percent of the Engineering Division employees work on the day shift (R.A. 272). Employees directly engaged in papermaking are on a bonus-incentive system (Pet. 37; R.A. 125–127), but

none of the Engineering Division employees is on bonus (R.A. 312).

On these facts, the Board (with one Member dissenting) concluded (Pet. 39):

> In all the circumstances of this case, including the absence of any bargaining history and the fact that the Engineering Division is a distinct administrative subdivision of the Employer, having a functional base of maintenance, construction, and utility work and employing primarily skilled employees who work out of their respective craft shops and do not work directly in the productive process, we agree with the Regional Director's conclusion that * * * [a] unit limited to the Engineering Division * * * is appropriate for collective bargaining purposes. * * *

The Board added that, although there was some overlapping of work skills among some of the employees doing maintenance work in the production divisions and some of the less skilled employees in the Engineering Division, this factor was not "sufficient to destroy the homogeneity and mutuality of interests of employees in the Engineering Division" (Pet. 39–40). Finally, the Board found that the degree of integration between the Engineering and the other divisions was not such as to preclude the establishment of a less-than-plant-wide unit (Pet. 40). Accordingly, the Board directed an election among the Engineering Division employees (Pet. 40).[3]

[3] The Board excluded 17 Engineering Division employees who were permanently assigned to the production divisions, finding that for all practical purposes these employees were not part of the Engineering Division (Pet. 39, n. 4).

The Unions won the election and were certified by the Board as the joint collective bargaining representative of the Engineering Division employees (R.A. 627–628), but the company refused the Unions' request to bargain, asserting that the Board's unit determination was invalid (R. A. 810; 59–60). In the ensuing unfair labor practice case, the Board, reaffirming its prior unit determination, held that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (R.A. 813–814). The Board ordered the Company to cease and desist from its unfair labor practice and to bargain with the Union upon request (R.A. 815–819).

The court of appeals (per Judge Madden) found that the Board had not abused its discretion in establishing a unit limited to the Engineering Division, and enforced the Board's bargaining order (Pet. 20–30).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. Further review is not warranted.

Section 9(b) of the National Labor Relations Act gives the Board wide discretion to determine whether the unit appropriate for collective bargaining "shall be the employer unit, craft unit, plant unit, or subdivision thereof." As the court below properly found, the Board did not abuse that discretion here. The Engineering Division is a "subdivision" of the plant, having been created by the Company itself as one of its ten separately supervised divisions; the employees in that Division have special skills and spend

a substantial portion of their time on tasks different from those engaged in by the other employees (*e.g.*, major maintenance, construction, and utilities); and there is no history of bargaining on a company- or plant-wide basis. In these circumstances, the Board's finding that the Engineering Division was an appropriate bargaining unit was reasonable. See *Armstrong Cork Co.*, 80 N.L.R.B. 1328; *East Texas Pulp & Paper Co.*, 113 N.L.R.B. 539, 542–544; *E. I. DuPont (Dana Plant)*, 117 N.L.R.B. 1048; *American Brass Co.*, 120 N.L.R.B. 1276, 1278–1279; *American Cyanamid Co.*, 131 N.L.R.B. 909.

Petitioner relies on *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (C.A. 4), certiorari denied, 361 U.S. 943, and *Royal McBee Corp.* v. *National Labor Relations Board*, 302 F. 2d 330 (C.A. 4), but those cases are not in point. In *Pittsburgh*, the Board, applying its *American Potash* doctrine,[4] had established, on the petition of the Electrical Workers, a craft unit of electricians at the company's glass-manufacturing plant. In so doing, the Board had considered neither the highly integrated nature of the operation nor the history of bargaining on a plant-wide basis at the company's other plants and in the glass industry generally. The Fourth Cir-

[4] In *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, the Board had held that, where a craft unit was sought to be severed from a pre-existing larger unit, such severance would be permitted, regardless of the degree of integration of operations or of the prior bargaining history, if (1) the employees sought to be represented constituted a true craft group and (2) the union seeking to represent them was a traditional representative of that craft.

cuit held that it was arbitrary for the Board to apply the *American Potash* doctrine in the glass industry at the same time that the Board was applying a different craft-severance policy in four other industries no more integrated than the glass industry.[5]

In *Royal McBee* (Pet. 45–49), there had been 13 years of bargaining on a plantwide basis (133 N.L.R.B. 1450, 1452) at the Company's Hartford plant when it transferred operations to Springfield, Missouri. The Board, applying its *American Potash* doctrine, permitted severance of an electrical craft unit at the new location upon the petition of the Electrical Workers, a traditional representative of that craft, without taking into account the integrated nature of the operations or the prior bargaining history. The Fourth Circuit, following its earlier decision in *Pittsburgh Plate Glass,* held that the Board was arbitrary in applying the *American Potash* doctrine to the typewriter industry while applying a different rule to other industries.

Since there was no effort in the present case to sever a craft unit from a pre-existing plant-wide unit—the situation with which the Board's *American Potash* doctrine deals—that doctrine is completely inapplicable and there is consequently no question of the discriminatory application of the doctrine—the

[5] In *American Potash*, *supra*, the Board had indicated that it would continue to consider integration of operations and prior bargaining history—as required by its earlier *National Tube* decision, 76 N.L.R.B. 1199—as a guide to craft-severance policy in four specific industries, *viz.*, steel, wet milling, lumber, and aluminum.

issue in *Pittsburgh* and *Royal McBee*. The appropriateness of the unit here was determined, not under the *American Potash* principle, which is inapplicable to some industries, but under principles that are uniformly applicable to all industries (see p. 7, *supra*) and take into account all relevant considerations, including the extent of integration of the employer's operation.[6]

The decision below is also consistent with *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438. The court below properly found that here, unlike *Metropolitan*, the Board in its published decision had adequately recited the reasons for its unit determination and those reasons were valid (Pet. 28). And, since the court did sustain the Board's unit determination here, petitioner's assertion that the court, had it reached a contrary conclusion, would have interpreted *Metropolitan* to mean the the reviewing court has no discretion to deny enforcement of the Board's order but must in every case remand the case to the Board, is purely hypothetical; it does not present a justiciable issue.

[6] As pointed out in the Statement, *supra*, p. 5, the Board found that the degree of integration between Engineering and the other divisions was not such as to preclude the establishment of a less-than-plant-wide unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
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OCTOBER TERM, 1965

No. 939

S. D. WARREN COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITIONER'S REPLY BRIEF

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NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITIONER'S REPLY BRIEF

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

On page 8 of its "corrected" Brief in Opposition to Petitioner's Petition for Writ of Certiorari, Respondent in its attempt to show that there is no conflict between the Decision of the Court of Appeals below (Pet. 20-30), and the Decision of the Court of Appeals for the Fourth Circuit in the case of *Royal McBee Corp.* v. *N.L.R.B.*, 302 F.2d, 330 (Pet. 45-49), makes a flagrant misstatement of National Labor Relations Board law.

Respondent asserts:

> "Since there was no effort in the present case to sever a craft unit from a pre-existing plant-wide unit, *the situation with which the Board's American Potash doctrine deals* — that doctrine is completely inapplicable. . ." (Emphasis added)

Although the facts in *American Potash* itself (107 N.L.R.B. 1418) arose in a context which involved severance, it is virtually hornbook labor law that the Board has never limited the application of the "four favored industries" *American Potash* doctrine to only severance cases. Rather, it has consistently applied that discriminatory doctrine to situations — like the instant case — involving the *initial establishment* of bargaining units in previously unorganized integrated operations.[1] Therefore, because the Board's doctrine of discrimination based upon identity of industry — which the Court below upholds and the Fourth Circuit rejects — does not itself distinguish between *severance* and *initial establishment* of bargaining units the conflict of Circuits is manifest even if *Royal McBee* did, in fact, involve "severance" (as it does not).[2]

---

[1]See: *The American Brass Co.*, 120 N.L.R.B. 1276, 1277; *Southwestern Portland Cement Co.*, 110 N.L.R.B. 1388, 1389-1390; *Rayonier, Inc.*, 110 N.L.R.B. 1191, 1192; *E. I. DuPont* (Houston Plant) 126 N.L.R.B. 885, 886, *Lord Baltimore Press*, 128 N.L.R.B. 334, 336; *E. I. DuPont* (Savannah River Plant) 111 N.L.R.B. 649, 650; *Vanadium Corporation of America*, 117 N.L.R.B. 1390, 1392-1393. Cf: *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 270 F.2d 167, 175 (4th Cir., 1959) *cert. den.* 361 U.S. 943 (1960. Compare: *Kaiser Aluminum*, 119 N.L.R.B. 695, 698-699, where the Board specifically said the *American Potash* doctrine would be applied to preclude initial establishment of fragmented units in any of the "four favored industries."

[2] The fact situation in *Royal McBee* involved the initial establishment of bargaining units in a wholly unorganized new plant in Missouri. (Pet. 45-49). To characterize that situation as "severance" (Respondent's Brief, p. 8) because a predecesso: plant a thousand

In short, there is a conflict in the Circuits as clearly recognized by the Court of Appeals below (Pet. 30), and the Respondent's strained and erroneous comments thereon serve only to sharpen the dichotomy between the Circuits and emphasize the need for resolving the conflict.

Conclusion

For the reasons aforesaid and those previously submitted, this Writ of *Certiorari* should be granted.

Respectfully submitted,

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Executed at Boston, Massachusetts
March 9, 1966

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miles away had a plant-wide unit puts a strain on the word it simply will not bear. There was absolutely no existing unit to sever anything from. The Fourth Circuit in *Royal McBee* did not even remotely allude to any distinction based upon severance versus initial establishment. Similarly, the Board in its Brief to the Court of Appeals in this case never mentioned such distinction. In its initial opinion the Court below appeared to rely in part upon such distinction. But upon having this error pointed out to it by Petitioner in its Petition for Rehearing (R.A. 897, 907), the Court subsequently abandoned any such reliance (Pet. 30, 33). Actually, the first mention by the Board of this purported distinction in these lengthy proceedings arose on page 8 of the initial version of Respondent's Brief to this Court in opposition to Petitioner's Petition for *Certiorari* where Respondent confused the facts in *Royal McBee* with the facts in another Fourth Circuit case not here pertinent. Upon being advised of such error by Petitioner's counsel, Respondent submitted a "corrected" copy of page 8 of its Brief deleting the incorrect facts from the other case but still leaving unchanged the basic misstatement of Board law vis-a-vis, severance and initial establishment of fragmented units in integrated industries.